Supreme Court, U.S.
FILED
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E. ROBERT SEAVER, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-729

MARK SHEPPARD, Petitioner,

vs.

STATE OF WASHINGTON, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION ONE - PANEL TWO

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. _____

MARK SHEPPARD, Petitioner,

vs.

STATE OF WASHINGTON, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION ONE - PANEL TWO

The petitioner, Mark Sheppard, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of the State of Washington (Division One - Panel Two) entered in this proceeding on June 14, 1971, which opinion became the final judgment and that of the highest court of the State of Washington as of September 3, 1971.

CITATIONS TO OPINION BELOW

The opinion of the Court of Appeals of the State of Washington (Division One - Panel Two), as set forth in the Appendix, infra, page 1, was not published but relied on the principles stated in State v. Duarte, 4 Wn. App. 825, _____P. 2d _____ (1971).

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JURISDICTION

The judgment of the Court of Appeals of the State of Washington (Division One - Panel Two) was entered June 14, 1971. A Petition for Rehearing was timely filed and denied by the Court on July 19, 1971. A Petition for Review was timely filed with the Washington State Supreme Court and denied by that Court on August 26, 1971. On September 3, 1971, the remittitur was issued by the Court of Appeals to the King County Superior Court. Petitioner prayed for an Order Staying Execution of the Judgment and Sentence of the King County Superior Court and for a Continuation of Petitioner on Bail Pending Certiorari to the United States Supreme Court, which application was denied by the sentencing judge and by the Chief Justice of the Court of Appeals. On November 15, 1971, application was made to the Honorable William O. Douglas, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Ninth Circuit, but has not yet been acted on by this Court apparently awaiting a reply from the respondent herein. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3) and Rule 22 (1).

QUESTIONS PRESENTED

1. Whether the search and seizure and introduction of the fruits of said search and seizure as evidence violates the Fourth and Fourteenth Amendments?

2. Was petitioner Sheppard's right to privacy and the sanctity of his home violated by unlawful governmental intrusion?

3. Have the Washington Courts misconstrued and severely limited the holding of the United States Supreme Court in Lewis v. United States, 385 U.S. 206, 17 L. Ed. 2d 312, 87 S. Ct. 424 (1966) and Katz v. United States, 389 U.S. 346, 19 L. Ed. 2d 576, 88 S. Ct. 507 (1967) as to the constitutionally protected right to privacy attaching to one's home?

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STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

There are no statutes involved except RCW 10.79.040, Article 1, § 7 of the Washington State Constitution, and the constitutional provisions are the Fourth and Fourteenth Amendments to the United States Constitution, which are set forth verbatim as follows:

RCW 10.79.040- Search without warrant unlawful. It shall be unlawful for any policeman or other peace officer to enter and search any private dwelling house or place of residence without the authority of a search warrant issued upon a complaint as by law provided.

Art. 1, § 7, Invasion of Private Affairs or Home Prohibited. No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

Fourth Amendment to the United States Constitution - The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fourteenth Amendment to the United States Constitution .

§1. Citizenship Rights Not to be Abridged by States
Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§2. Apportionment of Representatives in Congress
Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

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§3. Persons Disqualified from Holding Office

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

§4. What Public Debts are Void

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

§5. Power to Enforce Article

Section 5. The Congress shall have power to enforce by appropriate legislation, the provisions of this article.

STATEMENT OF THE CASE

Respondent charged petitioner with the crime of unlawful sale of dangerous drugs involving the sale of one capsule of LSD-25 sold to a Seattle Police Department undercover agent on February 20, 1970. On March 20, 1970, the complaint was filed in justice court ($3000.00 bail) and on March 22, 1970, petitioner was apprehended and released on $1000.00 cash bail on March 26, 1970. He has remained at large since that date, making all required court appearances. On June 8, 1970, the matter came on for trial in the King County Superior Court with the only defense presented being the duly and timely filed Motion to Suppress, the petitioner having waived a jury trial and not testifying in his own defense. On June 18, 1970, the sentencing judge having denied petitioner's Motion to Suppress and convicting him of the offense, sentenced him to the Department of Institutions for not more than 10 years.

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Detective Ron Sprinkle of the Narcotics Unit of the Seattle Police Department testified that he had been supplied information that kilo bricks of marijuana as well as large quantities of organic mescaline and LSD were being sold at the residence of appellant reputed to be 1611 First Avenue North in Seattle (St. 4, 7-8). The residence was also described as being 1716 First Avenue North (St. 7). Two recent graduates of the police adacemy were assigned to assist the Narcotics Unit by working the streets and letting their beards and hair grow. Detective Sprinkle supplied them funds to make drug purchases and the alleged residence of appellant was assigned as a target for such purchases (St. 5). The two cadets were officers Yost and Meyers (St. 4).

On the evening of February 20, Officer Meyers turned over to Detective Sprinkle at his office in the Public Safety Building an item of suspected LSD which was placed in a sealed narcotic envelope, marked, and at a later date turned over to the laboratory criminologist for analysis (St. 6). He identified State's Exhibit No. 1 as the envelope and indicated that based upon the analysis made of the contents secured on or about March 19 a warrant for appellant's arrest (St. 7-8).

Officer Meyers testified that Officer Yoshido and he went to the residence on February 20, were admitted by an unknown female after appellant invited him in; that the purpose was to set up a buy of kilos of marijuana; that appellant informed them that he had approximately 100 capsules of organic mescaline and opium mixture; that the officers then indicated a friend of theirs might be interested and asked to buy one capsule as a sample, which appellant agreed to do for $1.50; that the officers left with the one capsule and returned to the Seattle Police Department where it was marked, sealed, and turned over to Detective Sprinkle (St. 11-12).

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The trial judge in ruling on the motion to suppress and in outlining his findings admitted and found that the two undercover agents came to the residence on February 20 without an invitation to purchase narcotics (St. 30).

Appellant did not take the stand and the evidence is not in dispute that when the officers entered the home on February 20, they did so without probable cause to believe a felony was being committed inside the home or had been committed or was about to be committed by any of the occupants of the home, especially the appellant. The record is bare as to any prior activities on his part nor on prior visits by both officers were they able to substantiate any activity at the residence suggesting narcotic or drug violations. Neither did the officers at the time of entry on February 20 have in their possession warrants for the arrest of any of the occupants nor did they have search warrants.

The Court of Appeals ignored the implications of the Lewis case (Lewis v. United States, supra) and held that the fact pattern presented was nothing more than a "misplaced confidence in strangers" citing Hoffa v. United States, 385 U.S. 293, 17 L. Ed. 2d 374, 87 S. Ct. 408 (1966) and United States v. White, 39 U.S.L.W. 4387 (1971), and affirmed the decision of the trial judge. The Washington State Supreme Court denied the Petition for Review without comment.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts With Decisions Previously Rendered by the Supreme Court

There is no question but that the Fourth Amendment is to be liberally construed to effect the purpose of the framers of the Constitution in the interest of liberty. Olmstead v. United States, 277 U.S. 438, 464-5, 72 L. Ed. 944, 950 (1928). See dissenting opinion of Justice Black in Katz v. United States, 389 U.S. 347, 19 L. Ed. 2d 576, 591-2 (1967).

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It is submitted that the Washington Court's reliance on the Hoffa and White cases, supra, ignores the import and scope as well as the protections afforded by the two equally important cases on the right to privacy previously alluded to, namely, the Lewis and Katz cases, supra.

The United States Supreme Court recently in both the majority and concurring opinions reiterated the protections afforded one's home and his right to privacy from governmental intrusion. Speaking for six members of the Court, Mr. Chief Justice Warren stated:

> . . . Without question, the home is accorded the full range of Fourth Amendment protections. See Amos v. United States, 225 US 313, 65 L.Ed. 654, 41 S. Ct. 266 (1921); Harris v. United States, 331 US 145, 151, note 15, 91 L, Ed 1399, 1406, 67 S.Ct 1098 (1947). But when, as here, the home is converted into a commercial center to which outsiders are invited for purposes of transacting unlawful business, that business is entitled to no greater sanctity than if it were carried on in a store, . . . [Emphasis supplied).

Lewis v. United States, 385 US 206, 17 L.Ed 2d 312, 316, 87 S.Ct 242 (1966). Justice Brennan, with whom Justice Fortas joined in concurring stated (17 L.Ed. 2d 317):

> The Fourth Amendment protects against governmental intrusion upon "the sanctity of a man's home and the privacies of life." Boyd v. United States, 116 US 616, 630, 29 L. Ed 746, 751, 6 S.Ct. 524. However, the occupant can break the seal of sanctity and waive his right to privacy in the premises. Plainly he does this to the extent that he opens up his home to the transaction of business and invites anyone willing to enter to come in to trade with him. . . . (Emphasis supplied)

Mr. Justice Harlan, concurring in Katz v. United States, 389 US 346, 19 L.Ed 2d 576, 587, 88 S.Ct. 507 (1967) read that opinion to mean: (1) that in an area like a home (enclosed telephone booth), a person has a constitutionally protected reasonable expectation of privacy; (2) that electronic as well as physical intrusion into a place that is in this sense private may constitute a violation

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of the Fourth Amendment; and (3) that the invasion of a constitutionally protected area by federal authorities is, as the Court has long held, presumptively unreasonable in the absence of a search warrant.

Mr. Justice Black dissented in Katz, supra, solely because he could not accept the trend of the Court in the area of protecting one's privacy. This is clear, as the unmistakable trend, when he stated (19 L. Ed. 2d 598):

> With this decision the Court has completed, I hope, its rewriting of the Fourth Amendment, which started only recently when the Court began referring incessantly to the Fourth Amendment not so much as a law against unreasonable searches and seizures as one to protect an individual's privacy . . . the Court has made the Fourth Amendment its vehicle for holding all laws violative of the Constitution which offend the Court's broadest concept of privacy. . . . (Emphasis supplied).

Mr. Justice Stewart delivered the majority opinion in Katz, supra, and indicated the other provisions of the Constitution protecting personal privacy included the First, Third and Fifth Amendments. (19 L. Ed. 2d 581, f.n.5).

The question before the Court in Lewis, supra, was stated by Chief Justice Warren as follows (17 L. Ed 2d 314):

> The question for resolution here is whether the Fourth Amendment was violated when a federal narcotics agent, by misrepresenting his identity and stating his willingness to purchase narcotics, was invited into petitioner's home where an unlawful narcotics transaction was consummated and the narcotics were thereafter introduced at petitioner's criminal trial over his objection. We hold that under the facts of this case it was not . . . (emphasis supplied.)

The Petitioner contended that, in the absence of a warrant, any official intrusion upon the privacy of a home constitutes a Fourth Amendment violation and the fact the suspect invited the intrusion cannot be held a waiver when the invitation was induced by fraud and deception. Lewis, supra, 17 L. ed. 2d 315.

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In Lewis, the facts make clear that the petitioner upon being called by a stranger, agreed to sell the stranger (over the phone) marijuana and then proceeded to direct him to his house where the purchase was made. The evidence indicated two such occasions under similar circumstances. In fact, the Court was impressed by the fact that the petitioner attempted to induce the special undercover agent to become a "regular customer", and thereby concluded an "invitation" had been extended to an outsider to participate in unlawful business activities in petitioner's commercial center, (i.e., the home). Lewis, supra, 16 L. Ed 2d 316.

Note the similarity in State v. Wright, supra, where a female police agent wired with a radio transmitting device concealed in her clothing arranged by the telephone to meet the defendant in her home for the purposes of arranging for an abortion. The Washington Supreme Court stressed at 74 Wn. 2d 358 the following:

> . . . In the instant case, the defendant invited the informer into his home, fully cognizant of the risk that she might be a police agent, who . . .

In Hoffa v. United States, supra, on the issue of whether the Fourth Amendment protects a defendant from the risk of misplaced confidences (the specific question before the Court, as framed by counsel for the defendants, was whether evidence obtained by the government by means of deceptively placing a secret informer in the quarters and councils of the defendant during one criminal trial so violated the defendant's constitutional rights that suppression of such evidence was required in a subsequent trial of the same defendant on a different charge), the opinion by four members of the Court stressed that the petitioner Hoffa was not relying on the security of his hotel suite when he made the incriminating statements to the informer; that the

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informer was specifically invited by the petitioner to be present; that the informer did not enter the suite by force or stealth and it was clearly a question of misplaced confidence in a former friend and fellow union official. 17 L. Ed 2d 382 (At f.n. 6 the Court made clear that "the applicability of the Fourth Amendment if Partin had been a stranger to the petitioner is a question we do not decide. (C. Lewis v. United States, 385 US 206, 17 L. Ed 2d 312, 87 S. Ct. 424").

In United States v. White, supra, the Court was principally concerned with the Seventh Circuit's giving retroactive effect to the holding in Katz v. United States, supra, and four members of the Court upheld the proposition that police eavesdropping on conversations between the accused and an informant by means of a radio transmitter concealed on the informant's person does not violate the Fourth Amendment any more than does an informant's reporting on or secretly recording the conversations, neither of which is an unlawful search and seizure. The Court acknowledged it was the "violation of privacy" upon which the petitioner justifiably relied in Katz that made inadmissible the recordings in that case. United States v. White, 28 L. Ed. 2d 453, 457 (4/5/71). In White, the facts are clear that defendant sought out the informant and engaged in illegal narcotic business with him under circumstances which could not admit of a "justifiable reliance" of privacy. The Court reaffirmed the Lewis case but the questions presented here were not raised in White, namely, the two conditions requisite to the admissibility of evidence seized by an undercover agent in the home of a defendant (1) the defendant must have invited the agent to his home for the very purpose of illegally selling him narcotics, and (2) the home must have been converted into a commercial center to which outsiders are invited for commercial purposes.

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Although "unlawful activities" had supposedly come to the attention of the Seattle Police Department Narcotic Squad from the testimony of Detective Sprinkle, he had not observed such and there is no corroboration of proof offered to substantiate his statement in the record. Here, there was no invitation extended for an "unlawful" purpose, but merely as a friend who came to the door, to join with the others in the privacy of petitioner's home.

2. The Importance of Defining the Limits of One's Right to Privacy from Governmental Intrusion

As early as 1921, the United States Supreme Court in Gouled v. United States, 255 U.S. 298, 305, 41 S. Ct. 261, stated:

> It is impossible to successfully contend that a . . . search and seizure would be a reasonable one if only admission were obtained by stealth . . .

Justice Black (as previously noted above) dissented in the Katz case primarily because of this Court's trend to protect an individual's privacy utilizing the description "broadest concept". The Katz case was decided at the same time as the Hoffa case and neither case narrowed or overruled the Lewis case. Therefore, it is important in this day and age of the use of police informers and undercover agents to define such limits, if any, on their invasion of the sanctity of one's home.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals of the State of Washington (Division One - Panel Two).

Respectfully submitted,

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APPENDIX A

OPINION OF COURT OF APPEALS OF THE STATE OF WASHINGTON (DIVISION ONE--PANEL TWO).

ORDER DENYING PETITION FOR REHEARING

ORDER DENYING PETITION FOR REVIEW

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COURT OF APPEALS
STATE OF WASHINGTON - DIVISION I
DATE 6-14-71
CHIEF JUDGE

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
v.
MARK SHEPPARD,
Appellant.

NO. 647-1
Division One - Panel Two
FILED JUN 14 1971

SWANSON, J. -- Mark Sheppard was found guilty by the trial judge, a jury having been waived, of the crime of the unlawful sale of a dangerous drug--lysergic acid diethylamide, commonly known as LSD-25. Defendant Sheppard appeals and assigns error to the denial of his motion to suppress certain evidence consisting primarily of the conversation surrounding the sale of the LSD capsule and the capsule itself.

Sheppard argues admission to the home was gained by stealth and that the principle of entrapment applies. He contends that the guarantees secured by the Fourth Amendment against unreasonable searches and seizures, including a right to privacy in his home from governmental intrusion, were violated.

The evidence which appellant Sheppard sought to suppress was obtained by two undercover agents of the Seattle Police Department narcotics detail in a manner strikingly similar to the facts recited in State v. Duarte, 4 Wn. App. 825, ____ P.2d ____ (1971).[1] No useful purpose would be served by restating the facts or the

[1] Police Officers James K. Yoshida and Donald H. Meyers were involved in both as well as in the case at bar.

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law applicable. The same arguments advanced to us were presented and disposed of in Duarte. We adopt this statement from Duarte, 4 Wn. App. at 833, which is equally applicable here:

> In the instant case, the undercover agent or police officers, after prior visits to the defendant never objected to, were voluntarily admitted by the latter into his home and, in the course of voluntary conversations, defendant made a sale of LSD-25 to them. The defendant made no effort to exclude the officers or to decline to converse with them, nor does the agreed statement show that he raised any objection whatsoever to selling the drug involved. Under these facts and reasonable inferences therefrom, the court had a right to find that the admission of the agents to the defendant's home was by implied invitation and the conversations thereafter had freely and voluntarily undertaken. This is not a case of illegal violation of the security of one's home prohibited by the Fourth Amendment or prohibited by Const. art. 1, § 7, implemented by RCW 10.79.04. It is rather a case of misplaced confidence in the identity of the strangers to whom defendant voluntarily sold the LSD-25. Under the principles discussed and particularly in light of Hoffa v. United States, supra [385 U.S. 293, 17 L. Ed. 2d 374, 87 S. Ct. 408 (1966)], Lewis v. United States, supra [385 U.S. 206, 17 L. Ed. 2d 312, 87 S. Ct. 424 (1966)], and now United States v. White, supra [___ U.S. ___, ___ L. Ed. 2d ___, ___ S. Ct. ___, 39 U.S.L.W. 4387 (1971)], the evidence of the drugs purchased was properly admitted.

Pursuant to RCW 2.06.040, as amended by Laws of 1971, ch. 41, § 1, p. 63, this opinion will not be published.

Judgment affirmed.

Swanson, J.

WE CONCUR:

Farris, A.C.J.

James, J.

IN THE [illegible] OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MARK [illegible] HAND,

Appellant.

No. [illegible]

DIVISION

PETITION FOR REHEARING

The Court having considered the appellant's petition for a rehearing herein, Now, therefore,

IT IS ORDERED that the petition be and it is hereby denied.

Dated this [illegible] day of [illegible]

By the Court:

[signature]

Acting Chief Judge

In the Supreme Court

OF THE

STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent,

vs.

MARK SHEPPARD,

Petitioner.

No. 42089

Department

ORDER

DENYING

PETITION FOR REVIEW

The Court having considered the petition for review of the decision of the Court of Appeals in this cause,

It is ordered that the petition be and it is hereby denied.

Dated this 24 day of August, 1971.

By the Court:

FILED
SUPREME COURT
STATE OF WASHINGTON
'71 AUG 26 PM 2:00
WILLIAM H. LOWRY
BY _____
CLERK
DEPUTY

Chief Justice

STATE OF WASHINGTON,

Respondent,

v.

MARK SHEPPARD,

Appellant.

REMITTITUR

No. 41-1

King County No. 53714

The State of Washington to The Superior Court of the State of Washington in and for King County

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division I, filed on June 14, 19 71, became the final judgment of this court in the above entitled case on September 3, 19 71. This cause is remitted to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule 55 on appeal, costs are taxed as follows:

Eighty-eight and no/100 dollars ($88.00) in favor of respondent and against appellant. The petition for rehearing was denied by an order dated July 19, 1971; the petition for review was denied by an order dated August 26, 1971.

cc: Miller, Howell & Watson
Mr. John M. Watson
The Honorable Christopher T. Bayley
King County Prosecuting Attorney
Mr. John E. Oswald, Deputy
Mr. Mark Sheppard
The Honorable William H. Lowry
Mr. Richard F. Jones

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Seattle, this 3rd day of September A. D. 19 71

JOSEPH A. TIMBERLAKE
Clerk of the Court of Appeals, State of Washington, Division I.